

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 637

NORTHEASTERN PENNSYLVANIA NATIONAL BANK &
TRUST CO., EXECUTOR PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Decedent died on May 3, 1958. His will devised one half of the residue of his estate to petitioner as trustee and directed it to pay out of income, and corpus if necessary, \$300 per month to his widow until his youngest child reached the age of eighteen years and thereafter to pay her \$350 per month for life. Decedent's will also gave his widow a testamentary power "to appoint to her estate, or to others, any or all of the [trust] principal remaining at the time of her death." (Pet. 3-4.)

The question presented is whether part or all of the \$69,245 testamentary trust corpus qualifies for the estate tax marital deduction. This in turn depends on whether decedent's widow, in addition to hav-

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ing a general power of appointment over the trust corpus, was also entitled "for life to all the income from the entire interest, or *all the income from a specific portion* thereof, payable annually or at more frequent intervals." 1954 Code, § 2056(b)(5) (emphasis added).

The district court concluded that it could, by actuarial calculations, isolate the portion of the trust corpus from which the widow would be entitled to "all the income," and it set this amount at \$63,663.43 (R. 22a-34a¹). The Court of Appeals for the Third Circuit, sitting *en banc*, reversed by a vote of 5 to 3 (Pet. 1a-23a). It explicitly recognized that its decision conflicted with a recent decision of the Seventh Circuit in *Citizens National Bank of Evansville v. United States*, 359 F. 2d 817, in which the government has filed a petition for certiorari, No. 488, this term.

The Third Circuit concluded that where a decedent placed property in trust and directed that a fixed dollar amount be paid periodically to his widow, it was impossible to compute what portion of the corpus would be necessary to produce the fixed periodic amounts. Because the rates of return might fluctuate markedly over the widow's lifetime, an amount which would, in one year, produce the stated fixed amount might, in other years, produce far more or far less. Therefore, no computation could isolate any "specific portion" of the corpus from which the widow would, during her life, receive "all the income." The court declined to follow the Seventh Circuit's *Citizens Na-*

¹ "R." references are to the printed appendix to the government's brief in the court of appeals.

tional Bank decision and disallowed the claimed marital deduction.

We believe that the instant decision is correct. As explained in our petition for certiorari in *Citizens National Bank, supra*, Congress' purpose in enacting § 2056(b)(5) was to give a marital deduction only when the decedent made his widow "the virtual owner" of a portion of the trust property. S. Rep. No. 1013, Part 2, 80th Cong., 2d Sess., p. 16. Where the decedent gives her the right to only fixed periodic payments from the trust, so that her income will not rise and fall as the income of the trust fluctuates, she is not "the virtual owner" of "a specific portion" of the property. Since decedent's widow in this case was not entitled to "all the income" from either the entire property or a specific portion thereof, the lower court correctly denied the marital deduction.

In view of the direct conflict between the circuits on an issue of importance to estate planners, however, we believe that it would be appropriate for the Court to grant the instant petition, together with the government's petition in No. 488 which presents the same issue.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

RICHARD C. PUGH,
Acting Assistant Attorney General.

JACK S. LEVIN,
Assistant to the Solicitor General.

ROBERT N. ANDERSON,
MORTON K. ROTHSCHILD,
ALBERT J. BEVERIDGE III,
Attorneys.

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